

Joint Compliance Committee Meeting Summary
August 17, 2010
Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) &
Oregon State Board of Geologist Examiners (OSBGE)

A meeting of the Joint Compliance Committee (JCC) was called to order at 9:47 a.m. in the conference room of the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS), Salem, OR.

Board Members Present

OSBGE: Rodney Weick, RG, CEG
Gary Peterson, RG, CEG,
Appointed by OSBGE Chair
OSBEELS: Grant Davis, Chair, SE
John Seward, PE

Staff Present

Mari Lopez, Executive Secretary (OSBEELS)
Joanna Tucker-Davis (AAG)
Jennifer Gilbert, Executive Assistant
(OSBEELS)
James R. (JR) Wilkinson, Investigator
(OSBEELS)
Allen McCartt, Investigator (OSBEELS)

Approval of Meeting Summary

The meeting began with a review of the meeting summary from the JCC meeting on December 15, 2009. One discussion topic was the legal requirements regarding meeting minutes. Assistant Attorney General (AAG) Joanna Tucker-Davis introduced herself as the AAG for OSBEELS and distributed copies of Oregon Revised Statute (ORS) 192.650. She explained that the JCC would not need to keep minutes given that a digital recording of the meeting is available. However, if minutes are prepared they need to give a true reflection of the matters discussed and of the views of the participants, including the substance of the discussion of any matter.

Tucker-Davis continued that there was discussion about removing the names from the minutes for confidentiality reasons. She observed that OSBEELS does not have the authority as some agencies to remove names. The OSBGE would need to check for their authority, but OSBEELS can not remove names.

Rodney Weick stated the OSBGE position as they maintain confidentiality while in the course of the investigation and during deliberations on the investigation. They keep their AAG involved so they act under attorney-client privilege until the matter comes to their Board for vote. Tucker-Davis noted that the OSBGE should discuss the limits of their confidentiality with their AAG, but OSBEELS does not have that authority in statute. OSBEELS operates in clear view of the public. In addition, there is no need to create minutes if there is a meeting summary, but it would need to state that they are not minutes and a recording is available.

Weick opined to remove the names and use case numbers as identifiers. He agreed that the substance of discussion should be there, but not the detail. The summary could refer to the recording as public record and is available through OSBEELS. He believed a meeting summary would reflect the discussions, the critical points, the decisions, and the vote. Gary Peterson added that the record should build forward and provide a value about the issues that were discussed and how they were resolved.

John Seward revised the motion to accept changes to the minutes, to change the title to meeting summary, and to insert a provision that a recording is available. Weick second, motion unanimously approved.

JCC Mission Statement

Before discussing specific cases, there was a brief discussion about the JCC mission. Weick reminded the group that they developed three questions to guide their evaluation:

1. Is the person being complained about practicing within their area of competence and the scope of their license?
2. Is the quality of work up to accepted professional standards of the licensed profession?
3. Does the practice of the person being complained about jeopardize the safety or welfare of the public?

2590

James R. (JR) Wilkinson introduced OSBEELS case number 2590. This was a referral through last JCC meeting and was a straightforward case. Peterson pointed out that an attachment to the case summary entitled, Engineering and Geology Practice Guidelines, by the Joint Task Force on Areas of Practice has been rejected by OSBGE. He continued that it was not a valid document and has not been accepted, or mutually used, and is very controversial at the national level. In particular, he noted that it does not reflect the practice in Oregon as defined by statute.

Seward stated that the JCC is a microcosm of a much larger issue. Peterson clarified that the Guidelines ran into the national variation in practices where the West coast is different from the rest of the country. There were a number of problems with the document that made it unacceptable. Weick commented that it came from the geotechnical side of the debate, but civil engineers were upset about the limits to their practices. He mentioned as an example that a certified engineering geologist (CEG) can design, but should not recommend what steel to use for a foundation.

Returning to the case, Weick stated it was an OSBGE referral through the last meeting of the JCC. He continued that OSBGE was the lead on this case and their investigation found that the individual was practicing outside his expertise and authority of a licensed CEG. They propose sending a letter to the registrant stating he was practicing outside the scope of his registration when he recommended foundation design criteria. He should have retained a civil engineer to work with him, which is what their letter of concern would say. OSBGE would refer to OSBEELS to pursue an action for engineering without a license. Seward observed that is how the process is supposed to work.

Peterson emphasized that he is independent from OSBGE and suggested that the OSBGE fine him directly because he is an OSBGE registrant. He asked whether this would be acceptable to OSBEELS. After some discussion, Weick commented that he did not believe OSBGE has the authority to sanction him for the unlicensed practice of engineering, which is outside the scope of his registration. Supposedly, the individual has the education and experience to practice engineering. Therefore, the OSBGE would recommend that he become a professional engineer in order to pursue this type of work. Weick concluded that OSBGE can sanction him for practicing outside the scope of his CEG, but not for unlicensed practice of engineering.

Another topic was about the statutory exception for engineers who practice engineering on single-family residences. Prior to January 1, 2010, professional engineers who performed engineering on exempt structures¹ were not subject to OSBEELS oversight. That exception is no longer available. Wilkinson confirmed that the case involves a gazebo at a single-family residence. In addition, the individual also designed a retaining wall and a subdrain, which also might be covered by the exception. However, until the OSBEELS Law Enforcement Committee (LEC) reviews the case there is no determination whether the exception will apply to these types of appurtenances. Weick commented that the individual designed a subdrain into an existing drain system that was designed by an engineer without determining whether it was adequate to take on the additional water. Mari Lopez stated that the Wilkinson will update the case summary to reflect the JCC discussion and he will keep the OSBGE in the loop.

Action: OSBGE will send letter of concern with the recommendation that OSBEELS pursue whatever course of action is required.

2589

This case involves a major landslide affecting a single-family residence that is nearly 6,000 sq. ft. in size. A lot and septic system downslope was also affected by movement. In response to a question about pending lawsuits, it was noted the case settled. Also, there was discussion about potential conflicts of interest that Peterson may have since he worked for the homeowner reviewing geotechnical data. As a result of his review, he is familiar with the project's history and he proposed a solution that has not been implemented. After declaring his financial stake as payment for services, he commented that the issue was with the registrants who worked on site.

Peterson continued that the project developer hired different geotechnical firms to do roadway and general site geotechnical evaluations, but the individual lot owner assumed responsibility for development of their particular lot. The professional geotechnical engineer (GE) currently under investigation was hired when there was history on the site and the design recommendations were already made.

He continued that this was not a failure from poor construction inspection, which was at the core of the allegations, but an ancient landslide with deep seated movement 50-60' below the house in the native soils. The slide became reactivated and house movement began. Therefore, the failure zone is deep and was not affected by what was done near the surface. There were subsurface conditions that contributed to the failure.

Peterson described early site work where the first GE group identified the project area as ancient landslide terrain, well before development began, but they did not continue with the project. A second GE was hired and during his efforts the developer changed the lot configuration causing confusion. Regardless, Peterson believed there was a link broken in the continuity of hazard identification given the areal extent of the landslide. After the second GE completed his work, the subject lot was sold to a builder.

¹ ORS 672.060(10),(11).

The builder hired a third firm to do “geotech construction services as requested.” Peterson observed that the firm offers a testing service and not a design service. He added that the developer or builder had filled-in a ravine on the lot with imported waste material against the recommendations of the second GE. He opined that the fill material in the ravine factored into the landslide. The third firm and GE was contracted to evaluate only the foundation footings.

Peterson also expressed concern that the builder was looking at an opening date for the house. The last lot work was the landscaping. There was a problem and a water line broke. He believed the water drained into the ravine filled with non-engineered soil and contributed to further trigger the landslide. The landslide movement was more widespread than originally thought and was well beyond the footprint of the house. He believed the third firm and registrant were not responsible for the landslide.

The members discussed another landslide case in Astoria. That case contrasts, however, with this case in that the third firm and registrant did no design work and was hired to only verify foundation strength. The similarity in both cases is that the contractors failed to follow the recommendations of the geotechnical engineers and landslides were initiated.

Weick agreed that a CEG and a GE can fail to recognize a large area with landslide potential. In this case, the developer constructed roads, sold the lots, and the individual builder developed the lot. The prime developer should have looked at the stability of the whole site and taken measures to mitigate during earthwork and grading. However, current code does not require that approach. It is up to the professional ethics and standards of the CEG and GE to convince developers that it should be done that way. Then it becomes a cost/risk issue for developers. The developer in this case would say his infrastructure was done properly. The lots were sold to a private person and they did not follow the recommendations. The developer can then make the argument that his work did not fail, but it was builder for modifying the site and it was the landscaper for a broken water line.

On the point of the case, Weick believed that due diligence of the involved CEG would require that the firm review all the reports pertinent to the site before any foundation inspections. He asserted that professional ethics require protection of public health, safety, and welfare. It did not appear to him that the third firm studied the prior reports because they missed the replat that affected the lot configuration and the applicability of geotechnical data to a particular lot.

Peterson noted mistakes were made, but the GE was there to evaluate the foundation bearing pressures and the CEG reviewed the report for consistency. They were acting as a testing firm and were not hired to take over geotechnical responsibilities. Weick agreed stating they were brought in after the earthwork and grading, but they could have recognized that the ravine was filled-in and then provide appropriate disclaimers about their role. Grant Davis added that if a person was hired to test concrete, should they then be held responsible for not evaluating the design or other site conditions? He could not see where negligence occurred.

Attached to the case summary were copies of selected depositions of the GE. One set showed where the GE was repeatedly questioned on whether a professional engineer has an obligation to protect public health, safety, and welfare. The answers were mostly “unsure.” However, the

right answer was “yes,” but they also agreed that depositions are stressful and there are limits to the obligation that are difficult to describe, particularly when under oath.

Weick discussed the role of the CEG who reviewed the report prepared by the GE for quality assurance purposes. He asserted there was a failure from a testing perspective. In order to take over even for testing, the CEG should have researched previous recommendations and reports in order to understand the history of the site. Had that been done, then the issue of the ravine and when it was filled-in and how it could possibly affect the foundation would have been understood. They accepted liability, but it was a messy practice of engineering geology and geotechnical engineering.

Another point of discussion was that the GE conducted subsurface testing on the adjacent lot. The engineer of record for that lot determined a pile foundation was the solution, which was contrary to the foundation on the landslide lot. The JCC found that the two lots were separated by several hundred feet and 60-70' in elevation. In between the two lots was the ravine. The failure ran close to the property line. As a result, the two locations are not in the same position in the landslide and reacted differently.

Peterson suggested that OSBGE issue a letter of concern. He contended that the CEG should have reviewed previous recommendations and investigations. How do you know what you are inspecting is appropriate if you don't have the background? Seward countered by asking if it is reasonable to expect a professional to have an expanded scope from what they were hired to do? Lopez emphasized that the GE relied on the records of an unlicensed individual who was in the role of field inspector. Seward said it is typical practice for a technician to be under the guidance of a licensed person.

The members discussed next steps for the recommendations. Davis suggested that the JCC input would go to the LEC in a revised case summary. He believed the allegations against the GE are unfounded. The OSBGE would need to address their registrant.

The JCC next reviewed the testing service contract. Weick expressed his opinion that the firm should have understood the situation and brought the discrepancies to the builder's attention to document their findings. Then the builder would determine what to do. No professional caught that the replat of lots caused the second GE work to not match the final lot configuration. Seward disagreed and thought a letter of concern was appropriate. Davis noted that their contract was for foundation inspection services and was not for them to perform as the geotechnical firm of record to evaluate global stability. To expect them to have gone beyond the scope of services is not reasonable.

Action: the JCC recommends allegations unfounded for both the CEG and GE.

2615

The last case the JCC reviewed involved a CEG using “engineering” in the name of his company. The members agreed this was a good overlap issue since the person is a CEG, but was not practicing engineering.

Weick reviewed the list of services offered by the CEG and observed that most fall into the overlap area of practices. However, he noted issues with the CEG offering “shallow and deep foundation investigation and alternatives.” He continued that any violation would be dependent on the types of recommendations he provides. The JCC would need more clarification.

Peterson added that if he was a member of the public he would think the CEG could design a foundation and all the work for a house. His concern was compounded by the CEG referring to “design level geotechnical evaluations.” The CEG indicated a design level in the name that raised the issues. Given his list of services, he is offering services within the overlap area and is pushing the envelope on others. However, none cross the line into engineering. If he had prepared a report, then it could be examined to determine if he is offering or engaging in unlicensed engineering.

The JCC discussed moving the case to the LEC. Davis and Seward expressed the desire to issue a letter of concern. He is advertising, but whether he is engineering is not clear. Regardless, the services he offered are not engineering, but he uses “engineering” in the company name without employing a professional engineer. He is in violation of OAR 820-010-0720. Tucker-Davis recalled a prior LEC case with similar circumstances and that person changed the name of his company to achieved compliance. Weick commented that registrants have a responsibility to the profession and his company name and services are in the area of overlap. He pointed out that using the name misrepresents what he is doing, which can lead to fraudulent activities.

Lopez reminded the group that what they reviewed was a preliminary evaluation. The next OSBEELS step is to open the investigation by sending him a company questionnaire. After further discussion about potential false statements and misrepresentations under OAR 809-020-0060(5), **the JCC determined to conduct concurrent investigations that would be reported back to the JCC for additional discussion.**

The JCC discussed meeting dates in January 2011. The JCC determined to meet the day before the OSBEELS Board meeting on January 11, 2011.

The meeting adjourned at approximately 11:09. A recording of this meeting is available upon written request.